



EMPLOYMENT
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DEPARTMENT FOR WORK & PENSIONS

**PUBLIC CONSULTATION ON PROPOSED CHANGES TO THE TRANSFER OF EMPLOYMENT
(PENSION PROTECTION) REGULATIONS 2005 (SI 2005/649)**

RESPONSE BY THE EMPLOYMENT LAWYERS ASSOCIATION

5 April 2013

INTRODUCTION

i. The Employment Lawyers Association (“ELA”) is an unaffiliated group of specialists in employment law, including those who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint.

ii. ELA’s Legislative and Policy Committee consists of barristers and solicitors (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.

iii. Various of our members engage in advising clients on TUPE, and some of our members have a dual pensions and employment practice, hence our response to the Public Consultation.

iv. A working group was set up under the Chairmanship of Robert Davies of Dundas & Wilson LLP (“the Working Group”) to consider and comment on the DWP’s Public Consultation on the proposed changes to the Transfer of Employment (Pension Protection) Regulations 2005. A full list of the members of the working group is attached.

Specific Questions

1. Do you consider that the proposed changes to regulation 3 will correctly reflect the original policy intention as set out in the Explanatory Memorandum attached to the 2005 Regulations, and do the changes make the regulations workable in practice? If you do not believe that this has been achieved, please set out detailed reasons.

Paragraph 7.6 of the Explanatory Memorandum states that:

"Where the scheme offered is an occupational money purchase (DC) or stakeholder arrangement, **it will be up to the employee to decide** [our emphasis] on the amount of contributions which the employer will then be required to match, up to a 6 per cent prescribed maximum".

The issue of such choice is highlighted at Paragraph 7 of the Consultation Paper.

Various members of the Working Group have questioned whether there is any practical ambiguity in the existing provisions of the 2005 Pensions Regulations, given the language used in Regulations 3(1)(b)(i) and (ii). We assume that the concern identified in the Consultation Paper is to the effect that existing Regulations 3(1)(b)(i) and (ii) can be read as extending to a situation where an employee wishes to contribute at a certain rate, but this is being (unlawfully) ignored in some way – the actual rate differing from the rate nominated by the employee. This is not an issue that we have often encountered in practice.

It is unclear whether, by virtue of Paragraph 7.6 of the Explanatory Memorandum and Paragraph 7 of the Consultation Paper the intention is to provide an employee with a wholly unfettered right to set a contribution rate, irrespective of whether that coincides with pre-determined tiers of contribution in respect of a particular scheme. The latter point clearly goes to the issue of whether the new Regulation 3 may be workable in practice – although we note that it is a policy issue as to whether restrictions on scheme rules should be implemented in order to give priority to an unfettered choice on the part of the employee. We would anticipate that such an approach would certainly create a significant challenge as to the "workability" of the new Regulations in practice.

If the focus is solely on the employee's election as to the relevant rate of contribution (subject to the constraints that may exist within Scheme rules) we note that the draft revision does not state this explicitly in new Regulation 3(1D) (as set out in the 2013 Pensions Regulations). We assume that the Government has considered but rejected an amendment to the proposed text such as :-

"This paragraph is satisfied if, subject to paragraph (1E), the transferee's contributions are at least equal to the contributions chosen to be made by the employee provided the amount of the employee's contributions is permitted under the scheme rules."

Consequently, the Working Party has mixed views on whether the original policy intention, consistent with Paragraph 7.6 of the Explanatory Memorandum, is in fact reflected in the new Regulations.

We would also mention two very minor drafting points which relate to typographical points on the face of the draft Regulations:-

- in new Regulation 3(1)(b), the word "of" should be inserted after "requirements";
- in new Regulation 3(1A), "258(2)(h)" should be changed to "258(2)(b)"

If Guidance is provided to accompany any revisions to TUPE, we consider that it will be helpful for employers and employees for it also, for completeness, to capture any Guidance issued to accompany the 2013 Pensions Regulations.

2. Do you consider that the proposed introduction of an alternative method of satisfying the 'relevant contributions' will remove the risk that transferee employers might face substantially higher pension contributions than the transferor employer whilst maintaining the principle of adequate pension protection for transferring employees?

In essence, we agree that, if the 2013 Pensions Regulations are not introduced, there is the potential for anomalies to arise from auto-enrolment. That said, we also note that there is currently the potential that a requirement to match employee contributions up to 6% of the relevant pensionable pay may mean that transferring employees could ultimately receive a more generous pension arrangement from a transferee than that provided by the transferor.

The answer to the first part of Question 2 is therefore yes.

There are mixed views within the Working Party as to the second part of the question because if the measurement of adequacy is taken from an individual employee's subjective perspective the removal of the ability to specify a higher rate of contribution arguably does not maintain a principle of adequate pension protection.

The issue has also been raised within the Working Group that, if revised Guidance is issued to accompany the 2013 Pension Regulations, it may prompt employees who anticipate the possibility of a TUPE transfer to be in the offing to decide to increase their current rate of pension contribution unrelated to auto-enrolment considerations. This may increase the transferor's pension costs in the short-term if the employee's contribution is matched and in practice lock-in the transferee to a higher on-going rate of contribution. The desirability or otherwise of such a potential outcome is a matter of policy and as such beyond ELA's remit.

List of Working Group Members

Adrian Barnes, DBS Law Limited

Gemma Brown, TPP Law

Imogen Clark, Clifford Chance LLP

Robert Davies, Dundas & Wilson LLP (Chair)

Catherine Drinnan, Latham & Watkins

Hywel Griffiths, Ashton KCJ

Tessa Livock, Lawrence Graham LLP

Susan Mayall, Pearson Hinchliffe

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